United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

Original 77-4132

To be argued by DONALD CONGRESS
(20 minutes)

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

LAY FACULTY ASSOCIATION, LOCAL 1261
AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Petitioner,

-against-

NATIONAL LABOR RELATIONS BOARD,

Respondent,

-and-

ST. ANN'S EPISCOPAL SCHOOL,

Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

PETITIONER'S BRIEF

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UNITED STATES COURT OF APPEALS
FILED
DEC 21 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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COURT OF APPEALS ~~OF THE STATE OF NEW YORK~~
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AFFIDAVIT OF SERVICE BY MAIL

Index No.

77-4132

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

ANNE DENTE being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Brooklyn, New York 11228.

That on the 21st day of December, 1977 deponent served ~~three~~ two copies of the within Petitioner's Brief upon Simpson, Thacher & Bartlett at One Battery Park Plaza, New York, NY 10004 the address designated by said attorney(s) for that purpose by depositing a true copy of same by Certified mail, return receipt requested, enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Anne Dente
ANNE DENTE

SUBSCRIBED AND SWORN to before me this 21st day of December, 1977.

Michelle Flores

MICHELLE FLORES
NOTARY PUBLIC, State of New York
No. 24-4504917
Qualified in New York County
Commission Expires March 30, 1979

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Anne Dente
ANNE DENTE

SUBSCRIBED AND SWORN to before me this 21st day of December, 1977.

Michelle Flores

MICHELLE FLORES
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No. 24-4600679
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Commission Expires March 30, 1979

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ST. ANN'S EPISCOPAL SCHOOL,

Intervenor,

On Petition for Review of an Order of the
National Labor Relations Board.

PETITIONER'S BRIEF

PRELIMINARY STATEMENT

This case is before the Court upon the petition of the Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO, hereinafter referred to as either the "Union" or "petitioner," for review of a decision and order

dated June 10, 1977, of the National Labor Relations Board, hereinafter referred to as the "Board," upholding the Administrative Law Judge's dismissal of unfair labor practice charges brought against Saint Ann's Episcopal School, hereinafter sometimes referred to as the "intervenor" or the "School."*

The facts and circumstances surrounding the decision of the Administrative Law Judge as adopted by the Board are summarized infra.

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* References to pages of the Joint Appendix will be designated by the page number in said Joint Appendix; references to pages of the Exhibits to the Joint Appendix will be designated by the page number followed by -E.

QUESTION PRESENTED

Whether or not substantial evidence considered on the Record as a whole, including the body of evidence opposed to the Board's view supports the Board's dismissal of the complaint alleging the dismissal of one of intervenor's employees in violation of Sections 8(a)(1)(3) and (4) of the Act?

FACTS

(1)

This case came before the Administrative Law Judge for hearing based upon a complaint alleging, inter alia, that the intervenor violated Sections 8(a)(1)(3) and (4) of the National Labor Relations Act (hereinafter the "Act"). More specifically, the complaint alleged that intervenor, by its supervisors, Bridgette Barry, William Everdell and Peter Cohen, intentionally harassed Robert N. Hoffmann. They did so by excessive classroom observations, poor biannual evaluations, and eventually the termination of his teaching contract. This harassment resulted from Hoffmann's concerted activities, his activities on behalf of petitioner and his filing of charges with the Board.

Robert N. Hoffmann taught at intervenor for 3 years (17-E), having been hired for the year commencing September 1973 as a teacher in the science department until the end of the school year in 1976, when his contract was not renewed by intervenor (17).

(2)

The Administrative Law Judge found that:

1. "There is no question concerning the awareness by [intervenor] of the concerted activities not only of

Hoffmann but by all the members of the committee. . . " (17).

2. Intervenor harbored an animus with regard to the Union.

3. Intervenor's headmaster Stanley Bosworth characterized Hoffmann, the alleged discriminatee herein, as an organizer.

4. Department Chairman Peter Cohen informed Hoffmann that he had been instructed by Bosworth to write something about Hoffmann that could be used in the future (18).

5. On May 19, 1975, Hoffmann filed unfair labor practice charges against the intervenor which were ultimately resolved by a formal settlement agreement providing for the entry of a Board order and Court Judgment. On April 27, 1976, the cases were closed on compliance (18).

6. In the Spring of 1975, a new policy of written evaluations prepared by the chairman of the department concerning the performance of the teachers was instituted. Cohen's first evaluation of Hoffmann was made less than one month following the close of the unfair labor practice case instituted by Hoffmann (18).

7. During the 1975-76 school year Hoffmann was observed approximately 30 times as opposed to approximately 12 observations in the previous year (19).

The Administrative Law Judge concluded that despite the above findings of fact, the charges should be dismissed. He reasoned that since Hoffmann had been terminated a year after the intervenor's actions concerning his concerted activity, a sufficient nexus had not been shown between said actions and the termination.

> No intervening event has occurred nor is there any evidence of contemporaneous statements manifesting such motive on the part of the Respondent. Furthermore I find the evidence insufficient to warrant a conclusion that Respondent, in terminating Hoffmann, acted in such an arbitrary or capricious manner as would tend to indicate that its asserted reasons for that action were pretextual.

(21)

It is within the context of this finding that the facts are set forth.

The Administrative Law Judge found anti-union animus on the part of the intervenor (21), but emphasized that certain statements made by Department Chairman Peter Cohen were not alleged to be unfair labor practices and that allegations of other unfair labor practices were closed on April 27, 1976, on compliance (18, n. 3).

However, the Administrative Law Judge fails to note that two days later, on April 29, 1976, Hoffmann was informed by Cohen that his contract was not being renewed. The intervenor was clearly waiting for this prior case to be fully closed before it let drop the other shoe (105-E).

Intervenor sought to dismiss Hoffmann because of his union activities. In light of previous unfair labor practice charges and intervenor's clear singling out of Hoffmann, intervenor chose the relatively subtle and sophisticated route of documentating Hoffmann's alleged lack of teaching ability.

The record is clear that a policy of written evaluations of teachers was not instituted until the Spring of 1975, shortly after Headmaster Bosworth had advised his staff to act cautiously before signing a Union authorization card, stating that "there are forms of authority and organization far more offensive to professionals and intellectuals than those you have experienced in this administration." "Beware lest a few in desperation attempt to pull it down." (GC. 4) (Emphasis added.)

It was in this context that Bosworth instituted written observations as a means to provide a pretext for discharging Hoffmann.

The basis for this conclusion is strengthened by the uncontroverted testimony of Hoffmann that at the science department meeting held in the apartment of Ed Brady, another science teacher, Cohen told him of Mr. Bosworth's knowledge and animus:

> Mr. Cohen said that Mr. Bosworth had come to him and made some remark to the effect, 'You don't really know what's going on in your department,' and that Mr. Bosworth had said, '...well, wasn't he aware that Hoffmann was an organizer or was attempting to organize the employees, and [he] was spending [his] weekends, [his] afternoons, [his] spare time in organizing the faculty?'
>
> And that he said, 'that they couldn't get me now but that... Mr. Cohen didn't know the law, but to put something in writing, and whatever it was to be used in the future... Mr. Bosworth would stand behind it.'

(Tr. 68-E, 69-E).

Petitioner is aware that carefully contrived administrative records cast a heavy burden upon it. However, this burden is lightened by the testimony of Hoffmann's supervisors.

Bridgette Barry, head of the high school, who the Administrative Law Judge found had union animus, testified that even prior to her employment at the school she had received a negative impression of Hoffmann's teaching ability based upon a day she had spent touring the School in the fall of 1974. With amazing clarity Barry recalled specific negative

impressions she had received from Hoffmann's class during her brief visit, yet was unable to recall any other teachers she had observed that day.

Barry did not begin her employment at the School until April 1975. Only one course that Hoffmann taught came within her purview as head of the high school, physics. Barry repeatedly stated that her lack of knowledge in physics, having never taken a physics course, hindered her own direct observations of Hoffmann's teaching ability. The majority of her testimony was based upon oral complaints she allegedly received from students. The only student complaint Barry reported directly to Hoffmann was that of Andre Zugor. In this instance Hoffmann immediately requested a conference with the student, after which his work improved (259-260-E). Barry inexplicably testified that she reported the students' complaints to Cohen since Hoffmann refused to see her, and yet later on stated that Hoffmann came to her office occasionally to discuss students (260-E). She cited as an example of Hoffmann's reticence to visit her one incident that occurred the first week of school. Barry sent Hoffmann a note on September 22, 1975, approximately four days after school had resumed for the year and after her first observation, complimenting him on his class, suggesting that he should learn the students' names, and discussing the problems of a particular student (GC. 7). Nowhere in this note does Barry mention any

of the numerous complaints she allegedly received from students during that first week of school to forewarn Hoffmann that problems already existed in his class. On Friday, September 26, 1976, Barry sent Hoffmann a note requesting that he stop by her office to talk (RE. 2). Hoffmann did meet with Barry promptly, on Monday, September 29, 1976 (254-E). Barry testified that numerous students, almost the entire class, complained about Hoffmann's teaching the first week of school, and yet not one written complaint from either a parent or a student was produced to document these complaints. Hoffmann's physics students were for the most part juniors in the high school and not required to take the course during their junior year (150-E, 274-E). No explanation was given as to why they chose to remain in his class if he was as awful as we are led to believe. Barry testified that she had noted during her observations of Hoffmann's physics class that students wandered in late and, when in attendance, did not receive answers to their questions. In her position as head of the upper school, she is well acquainted with the severe attendance and cutting problems that exist at the School, particularly in the early morning hours (182-E, 184-E). The record reveals that, in an effort to control the problem, the School posted daily lists of students who cut throughout the School for teachers to become

acquainted with the students who were the greatest offenders. Hoffmann's alleged failure to answer students' questions is in direct contradiction with a comment Cohen made in evaluating Hoffmann's teaching in December 1975, wherein he states, "He uses the board well and responds directly to student questions..." (GC. 8) Barry's animosity toward unionism and her belief that it is detrimental to private education in the United States is the only logical explanation for her totally negative perception and evaluation of Hoffmann's teaching abilities (271-E).

Peter Cohen, who observed Hoffmann's classes 25 times throughout the year, had worked with him for three years. It was not until April 1975, after Hoffmann's Union sympathies became notorious, that Cohen began to find fault with Hoffmann's ability to teach. It should be noted that on April 5, 1976, when Cohen admittedly knew the charge had been filed, he observed Hoffmann three times. This was one day prior to his meeting with the Board agent in charge of the case (325-E, 326-E). Cohen testified that one of the multitude of reasons he observed Hoffmann admittedly more than other members of the department was that Hoffmann was the weakest member of the department. Cohen admitted that other members of the department had problems in the classes and that one teacher, Ed Brady, had to have one of his classes divided up mid-year

when he failed to maintain order or organization in the classroom. Brady was simultaneously having a problem with his ecology elective. Yet Cohen observed Brady's classes less than half the number of times he visited Hoffmann's (308-E, 311-E). Brady is still being retained as a teacher by respondent (310-E).

Cohen testified to specific incidents he observed while in Hoffmann's classes. Once again Hoffmann is criticized for failing to know the names of all his 75 to 85 students after the third day of school (319-E). Cohen testified that on March 16, 1976, he observed a lecture on neurophysiology in biology which was too complex and all but the brightest students were inattentive (283-E). Yet in his evaluation of April 14, 1976, he appears to be complimenting Hoffmann on his sophisticated presentation of neurophysiology (GC. 10). He also comments that Hoffmann has introduced additional labs pursuant to constructive criticism he made after a visit on March 11, 1976.

It is difficult to refute the other general complaints of "hostility in the classroom" and "frustration." It should be noted that no student or parent testified to these problems and there were no written complaints introduced in an effort to document them.

Respondent's witness, Katharine Logue, Assistant to the Assistant Headmaster, Linda Kaufmann, testified concerning various charts she had prepared to buttress the School's contention that Hoffmann's students did poorly on standardized examinations. This was respondent's major effort to present allegedly objective evidence of the poor quality of his teaching. It was not contested that these charts and comparisons were drawn up long after the decision to dismiss Hoffmann had been made. It became readily apparent from examining just a small portion of the raw data used compiling the graphs that the comparisons were not valid. Throughout the charts Logue used the scores of students who had an opportunity to take second examinations and compared them with Hoffmann's students who only had the opportunity to take their examinations once. This rather lopsided comparison was presented by respondent in an effort to support objectively its assertions concerning his teaching. On one chart, respondent's Exhibit 10, the poor performance of Hoffmann's students was illustrated by showing their scores on an examination two years and two teachers subsequent to their having been in Hoffmann's class (380-E). Logue's testimony and respondent's Exhibits 10 through 17 should not have been admitted

in evidence on two major grounds: relevancy -- they were not a contributory factor in the decision not to renew his contract due to the fact that they did not exist until after the decision had been made; and secondly, inaccuracy and unreliability -- they do not represent a valid comparison due to the intermixing of retake scores.

At a biology department meeting Cohen made a comment about biology scores.

> Question: "What did he say?"
>
> Hoffmann: "He referred to the test as a 'crock of shit.'" (134-E).

Cohen also made remarks about biology scores going down, even though the scores weren't in yet (133-E, 134-E).

Regarding a standardized test in chemistry given during the 1974-1975 school year, Arendt testified that the test scores were slightly above the national average. The results were predictable. Good students did very well, the poor students did poorly (192-E).

ARGUMENT

THE BOARD'S FINDING THAT INTERVENOR'S DISMISSAL OF EMPLOYEE ROBERT HOFFMANN WAS NOT IN VIOLATION OF THE ACT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE CONSIDERED ON THE RECORD AS A WHOLE, INCLUDING THE BODY OF EVIDENCE OPPOSED TO THE BOARD'S VIEW.

The Administrative Law Judge, after determining that Union animus existed, supra, found that the evidence was "insufficient to warrant a conclusion that intervenor in terminating Hoffmann, acted in such an arbitrary or capricious manner as would tend to indicate that its asserted reasons for that action were pretextual."

The test for evaluating the propriety of the Board's findings is whether substantial evidence considered on the record as a whole, including the body of evidence opposed to the Board's view, supports the Board's findings. Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951).

Professor Jaffe's analysis of Universal Camera* makes clearer the standard to be used by this Court:

> [U]nderlying the vexed word 'substantial' is the notion or sense of fairness.

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* Jaffe, Judicial Review: "Substantial Evidence on the Whole Record," 64 Harv. L. Rev. 1233, 1239 (1951).

> [t]he judge may - indeed must - reverse if as he conscientiously sees it the finding is not fairly supported by the record; or, to phrase it more sharply, the judge must reverse if he cannot conscientiously escape the conclusion that the finding is unfair.

It is petitioner's contention that an evenhanded examination of the record clearly indicates that Hoffmann was unfairly dismissed in violation of Section 8(a)(3) of the Act.

Although several instances of intervenor's conduct have been the subject of cases that were formally settled and closed upon compliance, the intervenor's pre-settlement conduct can and should be used as background evidence establishing the motive and object of intervenor's post-settlement activities. Joseph's Landscaping Service, 154 NLRB 1384 (1965).

This evidence clearly established Union animus, the fact that Hoffmann was considered the major Union organizer, and that the intervenor very much wanted to dismiss him.

Contemporaneously with Hoffmann's filing of unfair labor practice charges against the intervenor in May 1975, a new policy of written performance evaluation by department chairmen was instituted by the School. This should be viewed in the context of the Administrative Law Judge's

finding that shortly before this policy was instituted, Cohen had been instructed by Headmaster Bosworth to write something about Hoffmann which could be used in the future. Although the institution of this new system was not alleged to be in and of itself an unfair labor practice it, when coupled with the circumstances under which it was instituted and its use in cloaking the true motive for Hoffmann's dismissal, was not sufficiently considered by the Administrative Law Judge. The improper use of such a system is clearly illegal. Farah Manufacturing Company, 202 NLRB 666 (1973). This must be considered by the Court in weighing the evidence before it.

A primary justification put forth by the School for its dismissal of Hoffman was the alleged frequency of student complaints (272-E); none of which was supported by documentary evidence. For the Administrative Law Judge to give credence to such unsupported allegations indicates a basic lack of fairness on his part which should be remedied by this Court. The lack of any written complaints by students strains credulity. Nor did any parent of student testify to these alleged problems. The only reasonable conclusion was that written student comments were favorable and thus not produced.

As the United States Supreme Court has said in Interstate Circuit v. U.S., 306 U.S. 208, 226 (1939):

> The production of weak evidence when strong is available can lead only to the conclusion that the strong could have been adverse [citations omitted]. Silence then becomes evidence of the most convincing character.

According to the Administrative Law Judge, the most important factor allegedly considered by intervenor's administrators was the lower grades which students in Hoffmann's class were attaining on the college board achievement tests (20).

To support its contention, charts and comparisons drawn up long after the decision to dismiss Hoffmann had been made (20). The factual context concerning the admission of these charts is set forth supra at 13.

Some things become quite obvious. (1) Hoffmann is fired on April 29, 1976. (2) Three months after the firing, a relatively high administrator is assigned to develop a case based on test scores that Hoffmann was a bad teacher. (3) Only raw data were available prior to Hoffmann's firing, and it was impossible for anyone to know what it took Ms. Logue months to put together.

The raw data from which the charts were compiled did not permit a valid comparison. Thus Logue's testimony (351-E, 380-E) should have been given little if any weight and inter-

venor's Exhibits 10 through 17 should have been discounted on two major grounds: relevancy -- they were not a contributing factor in the decision to dismiss Hoffmann in that they did not exist until long after the decision was made, and secondly, inaccuracy and unreliability -- they did not represent a valid comparison due to the intermixing of retake scores.

Thus the reliance upon this data by the Administrative Law Judge was completely erroneous.

CONCLUSION

It is respectfully submitted that the Board's finding and conclusions are not based upon substantial evidence on the record considered as a whole, so that a decree should be issued reversing the Board's order and ordering Hoffmann reinstated nunc pro tunc with full back pay and benefits.

Dated: New York, New York
December , 1977.

Respectfully submitted,

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